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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 681

FIDUCIARY COUNSEL, INC.,
Petitioner,

v.

W. WILLARD WIRTZ,
Secretary of Labor,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Carl L. Shipley, attorney for Fiduciary Counsel, Inc., petitioner herein, respectfully requests in its behalf that the Supreme Court of the United States grant this petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in the above entitled case, set forth at page 1-A in the appendix hereto. This Court has jurisdiction per 28 U.S.C. 1254.

QUESTIONS PRESENTED

Did the court below err in concluding that petitioner Fiduciary Counsel, Inc., an investment adviser registered with the Securities and Exchange Commission pursuant to

the Investment Advisers Act of 1940, which supplies investment counselling and advice to two employee pension trusts of Parker Pen Company, is an "administrator, officer and employee" of such plans "who handles funds or other property" and is thus required to be bonded under the Welfare and Pension Plans Disclosure Act, 29 USC 308(d)(a)(1964)?

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 1:

> "All legislative powers herein granted shall be vested in a Congress. . . ."

Amendment 5

> ". . . No person shall be deprived of property without due process of law; . . . ."

STATUTES INVOLVED

29 USC 304(b)

> "The term 'administrator' whenever used in this chapter, refers to . . . the person or persons . . . actually responsible for the control, disposition or management of the money received or contributed . . ."

29 USC 308(d)

> "Every administrator, officer, and employee of any employee welfare benefit plan or of any employee pension benefit plan . . . who handles funds or other property of such plan shall be bonded as herein provided . . . . The amount of such bond . . . shall be not less than 10 per centum of the amount of the funds handled . . . except that any such bond shall be in at least the amount of $1,000 and no such bond shall be required in an amount in excess of $500,000."

29 USC 508(d)(b)

"It shall be unlawful for any administrator, officer or employee . . . to receive, handle, disburse or otherwise exercise custody or control of any of the funds or other property of any employee welfare benefit plan or employee pension benefit plan without being bonded as required . . .".

STATEMENT OF CASE

Petitioner, Fiduciary Counsel, Inc., is a registered investment adviser under the Investment Advisers Act of 1940, 15 USC, ¶ 80 b(1964) and is subject to regulation thereunder by the Securities and Exchange Commission. The respondent Secretary of Labor is the official responsible for administering the Welfare and Pension Plans Disclosure Act, 29 USC ¶ 201, et seq. Since October 2, 1962, petitioner has been retained on a fee basis to act as investment counselor for two pension trusts of the Parker Pen Company, Janesville, Wisconsin. These trusts were established for the purpose of funding retirement, death and disability benefits for certain of Parker's employees. The trustee of each trust is the Merchants and Savings Bank of Janesville, Wisconsin. Both of said trusts are noncontributory in that employees make no contributions to the trust fund; Parker Pen is the sole contributor. All funds of the two trusts are maintained in the custody of the trustee bank.

Under the trust instruments, the Merchants and Savings Bank of Janesville, Wisconsin, as corporate trustee, is given full power "to make such sales and investments from time to time in the trust fund held by it and to take every action with respect to the investment held therein as in its discretion it deems proper".

In addition, the trust instruments provide in terms that the Parker Pen Company "shall nevertheless have full power in its discretion from time to time to select and appoint an investment counsellor to direct the trustee to make sales

and investments and retain investments with respect to the trust fund held by the corporate trustee, and the corporate trustee shall act on such directions of the investment counsellor and make every sale or investment or retention of investment with respect to the trust fund held by it as directed by the investment counsellor."

Further, the trust instruments provide in terms that the Parker Pen Company "may remove the trustee at any time upon thirty days prior written notice to the trustee", and that either plan shall be terminated on thirty days' written notice from the Parker Pen Company.

Petitioner Fiduciary Counsel, Inc., at no time has physical possession of any of the funds or property of the two Parker Pen trusts. Such funds and property are at all times in the custody of the Merchants and Savings Bank of Janesville, Wisconsin, the corporate trustee. From time to time since October 2, 1962, petitioner has directed the trustee bank, pursuant to the provisions of the trust instruments, to make sales and investments, and the trustee bank has complied with such investment advice. Such compliance is, of course, subject to the bank's discretion as outlined above.

On April 25, 1963, respondent advised petitioner by letter that in his opinion petitioner is subject to the bonding provisions of the Welfare and Pension Plans Disclosure Act, which requires a bond of not less than 10% of the amount of funds "handled", or $500,000, whichever is less.

Petitioner claimed exemption from coverage by the Act on grounds it is not an "administrator, officer and employee of any employee welfare benefit plan . . . who handles funds or other property of such plan" within the meaning of the Act, and sought a declaratory judgment in the United States District Court for the District of Columbia to that effect. The parties, by means of interrogatories and a stipulation, disposed of controversy on material facts, and the parties cross-moved for summary judgment in said Court. The U.S. District Court granted respondent's motion for summary judgment and denied plaintiff's cross-motion for summary judgment.

Upon review the United States Court of Appeals for the District of Columbia Circuit in an opinion dated July 7, 1967, ruled that "we have no reason to reject the District Court's conclusions as to the coverage of the statute," but remanded the case to the U. S. District Court to determine whether or not respondent had acted reasonably in exempting, under his rules, banks and certain other regulated institutions, with whom petitioner competes, from the bonding requirements of the Act, while not exempting petitioner. Petitioner Fiduciary Counsel, Inc., respectfully requests this Court to issue a writ of certiorari to the United States Court of Appeals to review only the question of coverage of the statute as outlined hereinabove.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF A WRIT

The Welfare and Pension Plans Disclosure Act, 29 USC 308(d) requires in terms that every administrator, officer, and employee of any employee welfare benefit plan, or of any employee pension benefit plan, who handles funds or other property, shall be bonded in an amount of 10% of the amount of the funds handled up to $500,000. Section 308(d)(b) of the Act makes it unlawful for any of the named classes of persons "to receive, handle, disburse, or otherwise exercise custody or control of any of the funds or other property of any employee welfare benefit plan or employee pension plan benefit plan" without being bonded under the statute. The Act defines "administrator" as the person with responsibility for the control, disposition or management of the money received or contributed, irrespective of whether such control, disposition or management is exercised directly or through an agent or trustee designated by such person. (29 USC 304(b)). Although the Act (29 USC 302(a)) contains definitions for many of the other terms used in the statute, significantly it does not contain any definition of the statutory language "handles funds or

other property". The Secretary of Labor has promulgated rules which in effect modify and extend the Act, with a dragnet web of definitions including almost anyone having the remotest connection with any such plan, regardless of whether or not they are, as a matter of fact and law, an administrator or whether or not as a matter of fact and law they handle funds or other property of such plan.

Petitioner Fiduciary Counsel, Inc. is exclusively in the business of providing investment counselling and advice on a fee basis to selected clients, individual, corporate and otherwise. It is registered with the Securities and Exchange Commission and subject to the civil and criminal provisions of the Investment Advisers Act of 1940, under which the Securities and Exchange Commission regulates its registered investment advisers and requires from them reports and certain other administrative restrictions for the protection of the persons and entities for whom registered investment advisers provide counselling service. Petitioner never handles funds or other property of the two Parker Pen trusts involved herein, and never has custody of any such funds or other property. Petitioner is not responsible for "control, disposition or management of the money received or contributed", the Act's definition of an "administrator". The bank and/or Parker Pen are given that power under the plans. Under the trust instruments involved Parker Pen Company reserves the right to terminate both the trusts themselves and its agreement with the designated investment adviser, who is petitioner herein. The actual administrator and custodian of the funds and other property, and the only entity which handles said funds and other property, is the Merchants and Savings Bank of Janesville, Wisconsin. The trustee bank has full and complete discretion to buy and sell securities and take any other action with respect to the trust funds as in its discretion it deems proper. Although the bank-trustee is required to comply with the investment advice and counsel of petitioner, Fiduciary Counsel, Inc., it is nonetheless free not to do so in accordance with its discretionary power to take whatever action it deems proper as trustee and custo-

dian of the funds and property of the two Parker Pen trusts. In addition, Parker Pen Company has reserved to itself the power to terminate any relationship it has with petitioner Fiduciary Counsel, Inc., and more importantly, to terminate the plan and the trust on thirty days' notice, thus depriving the Merchants and Savings Bank of Janesville, Wisconsin, of any power as custodian to handle funds or other property of the two Parker Pen trusts.

Petitioner Fiduciary Counsel, Inc., respectfully submits to the Court that the actions of the Secretary of Labor herein amount to an exercise of legislative power in violation of Article I, Section 1 of the Federal Constitution, in that he has extended and broadened the coverage of the Act to include petitioner Fiduciary Counsel, Inc., which as a matter of law is not an administrator of the two Parker Pen plans, and does not handle funds or other property of either of such plans within the meaning of the Act. Petitioner Fiduciary Counsel, Inc., further respectfully submits that the action of respondent herein requiring it to be bonded under the Act, is arbitrary, capricious, and in violation of petitioner's right to due process under Amendment V to the Federal Constitution.

CONCLUSION

For the reasons outlined hereinabove and because the statute involved has not heretofore been construed by this Court or any other court with respect to the coverage of the Act, and additionally because the actions of respondent Secretary of Labor herein raise a serious constitutional question respecting the extent to which he can, in the exercise of administrative authority, extend and broaden the reach of an act of Congress, petitioner requests that a writ of certiorari be granted.

Respectfully submitted,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,620

FIDUCIARY COUNSEL, INC., APPELLANT,

v.

W. WILLARD WIRTZ, Secretary of Labor, APPELLEE.

Appeal from the United States District Court
for the District of Columbia

Decided July 7, 1967

Mr. Carl L. Shipley for appellant.

Mr. Jack H. Weiner, Attorney, Department of Justice, with whom *Messrs. David G. Bress,* United States Attorney, and *Morton Hollander,* Attorney, Department of Justice, were on the brief, for appellee. *Messrs. Alan S. Rosenthal* and *Richard S. Salzman,* Attorneys, Department of Justice, also entered appearances for appellee.

Before BAZELON, *Chief Judge,* McGOWAN and LEVENTHAL, *Circuit Judges.*

McGOWAN, *Circuit Judge:* Appellant, a registered investment adviser under the Investment Advisers Act of 1940, 15 U.S.C. § 80b (1964), and subject to regulation thereunder by the Securities and Exchange Commission, sought declaratory relief in the District Court against appellee,

who is charged with the administration of the Welfare and Pension Plans Disclosure Act, 29 U.S.C. §§ 301 *et seq.* (1964). Appellant asserted that it was not, as claimed by appellee, subject to the Act under the circumstances shown by this record; and that, even if it were, exemption from the statute is being discriminatorily, and therefore arbitrarily, withheld from it. The facts were stipulated. On cross-motions for summary judgment, the District Court dealt in terms with appellant's arguments as to the inapplicability of the statute, and disallowed them. It did not address itself expressly to appellant's alternative contention. We have no reason to reject the District Court's conclusions as to the coverage of the statute. We think, however, that it failed to recognize the substantial issue raised by appellant's assertion that its treatment in the matter of exemption is insupportable.

I

Appellant has, since 1962, acted as investment adviser in respect of two employee pension trusts of the Parker Pen Company, of Janesville, Wisconsin. The employer is the sole contributor; and a Janesville bank is the trustee. Although the trust instruments seemingly embody an unrestricted power in the trustee to control investment, they also clearly grant to the employer a right to retain an investment adviser who can give to the trustee binding directions as to investment. Appellant at no time has physical possession of any of the trust assets.

Appellee has notified appellant that it should comply with the bonding requirements of Section 308(d) of the Welfare and Pension Plans Disclosure Act. That section, the key provision of which is set forth in the margin,[1]

---

[1] "Every administrator, officer, and employee of any employee welfare benefit plan or of any employee pension benefit plan subject to this chapter who handles funds or

makes it unlawful "to receive, handle, disburse, or otherwise exercise custody or control" of any of the assets of a pension plan without being bonded in the required manner. Bearing in mind the Congressional concerns about the jeopardy in which pension assets had been placed by the dissipation which can flow from either direct thievery or dishonest investment, we think, as said above, that the District Court does not appear to have erred in its rejection of appellant's contentions that it is outside the statutory reach.[2] It is the issue raised by appellant but not discussed by the court, namely, the matter of exemption, which confronts us with difficulty.

Paragraph (e) of Section 308(d) provides as follows:

> Regulations; exemption of plan
>
> The Secretary shall from time to time issue such regulations as may be necessary to carry out the provisions of this section. When, in the opinion of the Secretary, the administrator of a plan offers adequate evidence of the financial responsibility of the plan, or that other bonding arrangements would provide adequate protection of the beneficiaries and participants, he may exempt such plan from the requirements of this section.

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other property of such plan shall be bonded as herein provided; except that, where such plan is one under which the only assets from which benefits are paid are the general assets of a union or of an employer, the administrator, officers and employees of such plan shall be exempt from the bonding requirements of this section." 29 U.S.C. § 308(d)(a) (1964).

[2] Appellant variously argued, by reference to the statute itself, that (1) it was not an administrator, officer, or employee of the plan within the meaning of the Act, (2) the Act was confined to those who physically "handle" fund assets, and (3) the plans here involved were outside the Act because the only assets involved were part of the general assets of the employer.

Under the authority of that grant of exempting power, appellee has promulgated this regulation (29 C.F.R. §.464.4(e):

> The terms "administrator, officer, and employee" shall not be deemed to include the following independent institutions, or natural persons acting in an employment or other representative capacity for such institutions, except with respect to covered plans for the benefit of their own employees:
>
> (1) any bank or trust company subject to regulation and examination by the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, or the Federal Deposit Insurance Corporation, or chartered under the laws of any State and operating in accordance with State law and subject to State supervision and examination.

The institutions so exempted are those with whom appellant competes for the business of providing investment advice. If they are to be relieved of the substantial cost of providing a bond under the Act while appellant is not, the latter's ability to compete is adversely affected. If, says appellant, exempting the one and not the other has no reasonable basis, then the denial of exemption to appellant offends both statute and constitution. It has no such basis, argues appellant, because the regulatory criteria employed in the regulation give no significantly greater assurance of security to the pension assets than do the regulatory conditions under which appellant has to function.

We note that Congress appeared to conceive that it was empowering the Secretary to give exemption to a particular plan, as distinct from interpreting the statute as not applying to certain persons. This is indicated both by the title of paragraph (e)—"Regulations; exemption of plan"—as well as by its provision that when "the administrator of a plan offers adequate evidence of the financial

responsibility of the plan, or that other bonding arrangements would provide adequate protection . . . [the Secretary] may exempt *such plan*. . . ." (Emphasis supplied.) Under the statute, a bank would not appear to be entitled to exemption until after it applies for it in respect of a particular plan and "offers adequate evidence" with respect to the statutory standards. The regulation, contrarily, defines a bank subject to state or federal supervision as not being an "administrator" within the meaning of the statutory command for bonding. The assurance of security for the particular plan in terms of "financial responsibility" or "other bonding arrangements" resides only in the fact that the bank is subject to federal or state supervision and examination.

The nature of that supervision varies widely. As appellant points out and appellee concedes, at least four states do not include bonding within their regulatory requirements; and Iowa, although it requires bonding, does not subject its banks to examination. Appellant points in this regard to the comprehensive character of the regulation which Congress has imposed upon it in the implementation of the "national concern" that the clients of investment advisers be assured of honest and responsible services from those engaged in that business. Investment advisers may not function without applying for authority by means of registration with the Securities and Exchange Commission. 15 U.S.C. § 80b-3(a)(1964). Such registration involves full information about the applicant and its methods of operation. 15 U.S.C. § 80b-3(c). The reporting and record-keeping requirements are extensive, 15 U.S.C. § 80b-4; 17 C.F.R. § 275.204-2; and the substantive prohibitions of fraudulent and faithless actions are as explicit as the penalties are severe. 15 U.S.C. § 80b-6 & 7; 15 U.S.C. § 80b-17. If an investment adviser actually acquires physical custody of a client's assets, the segregation and handling requirements are strict, and the adviser

is subject to a surprise annual audit. 17 C.F.R. § 275. 206(4)-2.

It is just possible, therefore, that the employees of Parker Pen Company are in no greater danger of having their pension assets diminished by reason of the dishonest investment advice emanating from appellant than they would be if this advice were supplied by a state bank which is either not bonded at all or in an amount less than that required by the Act, or which is not examined at all or only in a perfunctory manner.[3] In any event, appellee's exempting regulation is not constructed so as to give him an opportunity to compare these relative dangers. For all practical purposes, banks are declared outside the statute without reference to whether the character of the regulation applicable to a particular bank comports with either of the statutory standards by which Congress has said that the exemption of a particular plan is to be measured.

We do not say that the regulation is invalid as it stands. Neither we nor the District Court were asked to do this, and any such claim has not been raised and developed in a manner suitable for its wise resolution. We do say that the form in which the regulation is cast raises serious questions as to why one situated as was appellant was not also brought within its embrace. The District Court, as we have noted, did not comment in any way upon this aspect of appellant's case as alleged in its complaint. We reverse the grant of summary judgment to appellee, and

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[3] The stipulated facts recite that, except for four officers, appellant's employees are covered by a Blanket Honesty Bond issued by the Indemnity Insurance Company of North America. It is recited that this bond falls short of the bond requirements specified in the Act, but we note that appellee's exempting regulation comprehends banks with either no bonds at all or those which fall below the statutory prescription.

remand in order that the District Court may address itself to this issue on the basis of such evidence as may be relevant to the reasonableness of appellee's action in exempting the banks but not appellant.

It is so ordered.

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CITATIONS

Statute and regulation:

Welfare and Pension Plans Disclosure Act, 72 Stat. 997, as amended, 29 U.S.C. 301, *et seq.*:

Sec. 2(a), 29 U.S.C. 301(a)	8
Sec. 2(b), 29 U.S.C. 301(b)	8
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Sec. 13(a), 29 U.S.C. 308d(a)	2, 6, 7, 8, 9, 10
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281-088—67

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 681

FIDUCIARY COUNSEL, INC., PETITIONER

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia (Pet. App. 1–7) is not yet officially reported, but is unofficially reported at 65 L.R.R.M. 2814 and at 55 Labor Cases (CCH) para. 12,038. The oral opinion of the district court (J.A. 18–21)[1] is unofficially reported at 63 L.R.R.M. 2500 and at 54 Labor Cases (CCH) para. 11,565.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1967. The petition was filed on October 4, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "J.A." refers to the joint appendix filed in the court below.

QUESTION PRESENTED

Whether the courts below correctly sustained the determination by the Secretary of Labor that petitioner, a corporate investment adviser, is subject to the bonding requirement of Section 13 of the Welfare and Pension Plans Disclosure Act since it directs investments and sales of the assets of certain employee pension plan funds, pursuant to the provisions of the pertinent trust instruments.

STATUTE INVOLVED

Section 13 (29 U.S.C. 308d) of the Welfare and Pension Plans Disclosure Act, 72 Stat. 997, as amended (29 U.S.C. 301 *et seq.*), provides as follows:

> Sec. 308d(a) Every administrator, officer, and employee of any employee welfare benefit plan or of any employee pension benefit plan subject to this chapter who handles funds or other property of such plan shall be bonded as herein provided; except that, where such plan is one under which the only assets from which benefits are paid are the general assets of a union or of an employer, the administrator, officers and employees of such plan shall be exempt from the bonding requirements of this section. The amount of such bond shall be fixed at the beginning of each calendar, policy, or other fiscal year, as the case may be, which constitutes the reporting year of such plan. Such amount shall not be less than 10 per centum of the amount of funds handled, determined as herein provided, except that any such bond shall be in at least the amount of $1,000 and no such bond shall be required in an amount in excess of

$500,000: *Provided,* That the Secretary, after due notice and opportunity for hearing to all interested parties, and after consideration of the record, may prescribe an amount in excess of $500,000, which in no event shall exceed 10 per centum of the funds handled. For purposes of fixing the amount of such bond, the amount of funds handled shall be determined by the funds handled by the person, group, or class to be covered by such bond and by their predecessor or predecessors, if any, during the preceding reporting year, or if the plan has no preceding reporting year, the amount of funds to be handled during the current reporting year by such person, group, or class, estimated as provided in regulations of the Secretary. Such bond shall provide protection to the plan against loss by reason of acts of fraud or dishonesty on the part of such administrator, officer, or employee, directly or through connivance with others. Any bond shall have as surety thereon a corporate surety company which is an acceptable surety on Federal bonds under authority granted by the Secretary of the Treasury pursuant to sections 6–13 of Title 6. Any bond shall be in a form or of a type approved by the Secretary, including individual bonds or schedule or blanket forms of bonds which cover a group or class.

* * * * *

Sec. 308d(e) The Secretary shall from time to time issue such regulations as may be necessary to carry out the provisions of this section. When, in the opinion of the Secretary, the administrator of a plan offers adequate evidence of the financial responsibility of the plan, or

that other bonding arrangements would provide adequate protection of the beneficiaries and participants, he may exempt such plan from the requirements of this section.

STATEMENT OF THE CASE

Petitioner, Fiduciary Counsel, Inc., is a New York corporation registered with the Securities and Exchange Commission as an investment adviser and engaged in the business of providing counseling to clients on a fee basis with respect to the purchase and sale of securities (Pet. App. 1). Since October 1962, petitioner has been acting as investment counselor to two pension trusts set up by the Parker Pen Company for the purpose of providing retirement, death and disability benefits for certain of its employees. The trusts, with a total value of $6,538,000, consist entirely of funds contributed by the Parker Pen Company; and the trustee of each plan is presently a Wisconsin bank (Pet. App. 2; J.A. 14, 19). Although making no contributions, the employees eligible to receive benefits were informed about the existence and nature of these trusts (J.A. 14).

All funds of the trusts are segregated from Parker Pen's general assets and are separately maintained in the custody of the trustee. Both trust instruments provide that the company shall have "no right, title or interest in the contributions made by it under the Plan," that no part of the retirement fund or its income shall revert to the company, and that all benefit payments shall be paid "only" from the retirement fund (Govt. C.A. Br. 1b–3b). While the trustee is given

full power to make sales and investments from time to time, the instruments clearly grant to the employer "a right to retain an investment adviser who can give to the trustee binding directions as to investment" (Pet. App. 2). Pursuant to this provision the company named petitioner, Fiduciary Counsel, Inc., the investment counselor to the trust (J.A. 14, 19). It was "mandatory" that the trustee bank "make every sale and investment which [Fiduciary Counsel, Inc.] direct[ed] it to make, and from time to time since October 2, 1962, [Fiduciary Counsel, Inc.] has directed the trustee Bank, pursuant to this provision, to make sales and investments which the trustee Bank has made" (J.A. 15).

Parker Pen has filed reports covering the two plans with the Secretary of Labor as required by the reporting and disclosure provisions of the Welfare and Pension Plans Disclosure Act. On April 25, 1963, the Secretary advised petitioner, Fiduciary Counsel, Inc., that it was subject to the bonding requirement of the Act (Pet. App. 2). Petitioner, upon being so notified, indicated its disagreement with this determination.

Petitioner then brought this action against the Secretary to obtain a declaratory judgment either that the bonding requirement of the Act did not apply to it, or that, if applicable, the Secretary was arbitrary and capricious in not granting it an exemption (Pet. App. 2). The Secretary counterclaimed for an injunction requiring petitioner to bond its employees against dishonesty losses in the handling of funds of the two

Parker Pen pension plans.[2] On cross-motions for summary judgment, the district court granted judgment for the Secretary, agreeing that the bonding requirement of Section 308d(a) was applicable to Fiduciary Counsel, Inc. (J.A. 17–21).

Noting that the investment counselor in this case "participates in the administration of the fund because it not only advises but actually gives binding directions as to what investments should or should not be made," the district court concluded that "the Secretary of Labor acted reasonably in construing the word 'administrator' as applying to the [petitioner]" (J.A. 20). The district court further found that petitioner was subject to the bonding requirement of the Act as a person who handles the funds of the plan, because "[a] person who has the power to give binding directions as to the investment of the fund participates in handling the funds" (J.A. 20).

The court of appeals affirmed the district court's ruling that petitioner is subject to the bonding provisions of the Welfare and Pension Plans Disclosure Act, expressly noting "the Congressional concerns about the jeopardy in which pension assets had been

[2] Section 13(b) of the Act (29 U.S.C. 308d(b)) makes it "unlawful for any administrator, officer, or employee" to whom the bonding requirement of Section 13(a) applies "to receive, handle, disburse, or otherwise exercise custody or control of any of the funds or other property of any employee welfare benefit plan or employee pension benefit plan, without being bonded as required by subsection (a) * * *."

placed by the dissipation which can flow from either direct thievery or dishonest investment * * *'" (Pet. App. 3). However, the court of appeals remanded the case to the district court for a determination as to the reasonableness of the Secretary's regulation which exempts banks,[3] but not registered investment advisers like petitioner, from the bonding requirement[4] (Pet. App. 6–7).

ARGUMENT

The decisions of the courts below—and the administrative determination of the Secretary of Labor—that Section 13(a) of the Welfare and Pension Plans Disclosure Act covers the investment counselor here involved are plainly correct. That statutory provision requires the bonding of "[e]very administrator" of an employee pension plan "who handles funds or other property of such plan * * *" (*supra*, p. 2). Petitioner clearly fits into that category. No conflict with the decision of any other court exists. Indeed, petitioner does not cite a single case in its certiorari petition. Review by this Court is thus not warranted.

As recognized by the court of appeals (Pet. App. 3), Congress enacted the Welfare and Pension Plans

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[3] By regulation (29 C.F.R. (1967 rev.) 464.4(e)) the Secretary has exempted from the bonding requirement banks and trust companies subject to regulation and examination by federal or State authorities (see Pet. App. 4). That regulation is promulgated pursuant to the authorization contained in 29 U.S.C. 308d(e) (*supra*, pp. 3–4).

[4] The Secretary is not seeking certiorari from that part of the decision of the court of appeals directing this remand.

Disclosure Act in light of the "rapid and substantial" growth in recent years of employee welfare and pension plans, which directly affect "the continued well-being and security of millions of employees and their dependents" (29 U.S.C. 301(a)). Against this background, the Act was enacted to protect "the interests of participants in employee welfare and pension benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto" (29 U.S.C. 301(b)). Thus, to protect the employees covered by the plan "against loss by reason of acts of fraud or dishonesty on the part of such administrator, officer, or employee, directly or through connivance with others" (29 U.S.C. 308d(a)), the Act requires that "[e]very administrator, officer, and employee of an employee welfare benefit plan or of any employee pension benefit plan subject to this chapter who handles funds or other property of such plan shall be bonded" upon terms satisfactory to the Secretary of Labor (*ibid.*).

The investment counselor in the instant case is plainly within the statutory provisions requiring the bonding of "[e]very administrator" of an employee pension plan "who handles funds or other property of such plan * * *." As pointed out by the courts below, "The investment counselor in this instance participates in the administration of the fund because it not only advises but actually gives binding directions as

to what investments should or should not be made" (J.A. 20; see also Pet. App. 2).[5]

Moreover, in directing the trust fund investment policy to be followed by the trustee bank, petitioner necessarily "handles funds or other property" of the two pension plans. As pointed out by the court of appeals, "Although the trust instruments seemingly embody an unrestricted power in the trustee to control investment, they also clearly grant to the employer a right to retain an investment adviser who can give to the trustee binding directions as to investment" (Pet. App. 2).[6] Indeed, it was stipulated that "it is mandatory that the trustee Bank make every sale and investment which [petitioner] directs it to

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[5] Petitioner's reliance on the statutory definition of the term "administrator"' in 29 U.S.C. 304(b) is quite misplaced. In substance, that term is defined as referring to those "actually responsible for the control, disposition, or management of the money received or contributed * * *." One empowered to give binding directions as to the investment of trust funds is, without doubt, in fact "responsible for the control, disposition, or management" of those funds. Here that power was actually exercised by petitioner (see *infra*, p. 10). And, as noted by the district court (J.A. 20), Section 304(b) plainly contemplates that "[t]here may be more than one administrator."

[6] That the company reserved the right to terminate its relationship with petitioner, and, indeed, to terminate the employee benefit plan itself, does not argue for a result different than that reached below. Unless and until such termination occurred, petitioner was covered by the provisions of Section 13(a) (29 U.S.C. 308d(a)). If that were not the case, an easy escape from the Act's bonding requirement would be provided—retain an investment adviser but make the arrangement a terminable one. Congress could hardly have intended to sanction such a facile device which would effectively deny the protections of the Act to the intended beneficiaries—the employees covered by the particular plan.

make, and from time to time since October 2, 1962, [petitioner] has directed the trustee Bank, pursuant to this provision, to make sales and investments, which the trustee Bank has made" (J.A. 15).[7] Thus, petitioner not only had the power to control the trust funds, but actually exercised that power.[8] In sum, the Secretary's determination that petitioner is within the reach of the bonding requirement of the Act was both reasonable and correct, and, contrary to petitioner's contentions (Pet. 7), did not extend or broaden that requirement beyond the scope intended by Congress. Petitioner's claim that it is outside the coverage of the Act was thus properly rejected.

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[7] Thus, even if it might be concluded that petitioner is not technically an "administrator" (but see note 5, *supra*), Section 13(b) (29 U.S.C. 308d(b)), in addition to the language set out in note 2, *supra*, further provides that "any other person having authority to direct the performance of such functions" (*i.e.*, receipt, handling, etc., of employee benefit plan funds) shall not permit such functions to be performed unless the bonding requirement of Section 13(a) has been met. This language cannot be regarded as superfluous. Rather, it manifests the congressional intent to ensure that the functions normally performed by administrators will be covered by the bonding requirement, even if assigned or delegated to others. To permit such individuals to go unbonded would obviously frustrate the purposes of the Act (see 29 C.F.R. (1967 rev.) 464.4(d)), which implements this language in Section 13(b)).

[8] In this connection, it is significant that the Secretary's regulations provide that the scope of the term "handles", as used in this context, includes "decision making powers with respect to funds or property which can give rise to * * * risk of loss" to the pension plan beneficiaries (29 C.F.R. (1967 rev.) 464.7(a)).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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